

The Non-Subscriber Case Law Update

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Recent Arbitration Cases of Note

The Texas Supreme Court and 5th Circuit Federal Court of Appeals recently issued opinions which have an impact on the application of arbitration in the non-subscriber context. What follows is a discussion of those opinions.

In in re Labatt Food Service, 52 Tex. Sup. Ct J 352 (Tex. 2009), the employee died from an asthma attack while at work. Prior to his untimely death, he signed an arbitration agreement which contained an indemnification provision. The employee's children and wife filed suit for his death as wrongful death beneficiaries. The employer moved to compel arbitration. The district court denied the motion and an appeal was filed. The employee's wife and children argued that since they did not sign the arbitration agreement, it could not be enforced against them. They also argued the agreement was unenforceable as the indemnification agreement was anathema to a pre-injury release, which was barred by the Texas Legislature a few years ago. The Texas Supreme Court likened the arbitration agreement to a settlement agreement or a consumer pre-injury release where a living individual waives his claims. The court pointed to prior case law upholding the application of settlement agreements and consumer pre-injury releases to family members of the now deceased signatory. Interestingly, the court noted that consortium claims brought by a wife or children of an injured employee would not be barred by the release because, unlike claims filed pursuant to the wrongful death act, they are not derivative of the employee's claim. The court also held that the challenge to the enforceability of the entire contract due to the presence of the indemnification provisions must be determined by the arbitrator.

The Fifth Circuit Court of Appeals had an opportunity to address under what circumstances a party can seek review of an arbitrator's award. In Citigroup Global Markets, Inc v. Bacon, 2009 WL 542780 (5th Cir. 2009), the parties arbitrated a dispute where Ms. Bacon's husband forged her name to withdrawal slips to obtain \$238,000.00 in funds from her brokerage account. The arbitrator heard the case and awarded her \$256,000.00. Citigroup sought to vacate the award as it claimed the award was in manifest disregard of the law. The District Court agreed and vacated the award. The Plaintiff appealed to the 5th Circuit Court of Appeals. The court examined a recent U.S. Supreme court case and found that manifest disregard of the law by the arbitrator is no longer a ground to reverse or vacate an arbitration award. Arbitration awards can only be vacated based upon the grounds set forth in the Federal Arbitration Act (FAA). Those grounds are: (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption in the arbitrator(s); (3) where arbitrator(s) were guilty of misconduct for failing to postpone the arbitration in response to a request where sufficient cause was shown; (4) or where the arbitrator exceeded his powers or so imperfectly executed them that a mutual, final and definite award on the subject matter was not made.

Comment:

It is a positive development that the Texas Supreme Court has clarified that arbitration agreements are binding on a deceased's employee's family. It is important because wrongful death claims provide some of the greatest exposure to non-subscribing employers. The downside to the opinion is that it clarifies that there is an opening for children and spouses of injured employees to avoid arbitration through assertion of loss of consortium claims. Granted, these claims are only available when the employee survived and is injured. The loss of consortium and loss of society claims usually have limited value but are dependent upon the facts of the employee's injury and its effect on the spouse and children.

It is hard to say if the 5th Circuit's opinion in Citigroup is harmful to employers. It all depends upon whether your side prevailed. If the arbitrator disregarded the law, neither side can appeal and seek reversal based upon manifest disregard of the law. Granted, this opinion follows the purpose of the Federal Arbitration Act; namely, to provide final decisions that are not appealable as one of the goals of the FAA is to avoid the expense and perpetual appeals that are a symptom of the legal process. In general, the Citigroup opinion is probably beneficial to non-subscribing employers as a non-subscribing employer is unlikely to have a basis to seek reversal of an award for manifest disregard due to the ease with which liability for an employee injury can be established under Texas law. It is more likely that an employee who is unable to secure a liability finding would have a basis to reverse the arbitrator's award for manifest disregard of the law. As such, this opinion will make it more difficult for an employee to overturn an unfavorable liability finding.

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